INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	12
Appendix	13

CITATIONS

Cases:

Calmar S.S. Corp. v. *Scott*, 345 U.S. 427	8
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215	12
Coleman v. *Miller*, 307 U.S. 433	9
Dalehite v. *United States*, 346 U.S. 15	12
Derrington v. *City of Detroit*, 223 Fed. 232	10
Henry Steers, Jr., The, 110 Fed. 578	10
Lacey v. *United States*, 98 F. Supp. 219	9, 12
Page v. *United States*, 105 F. Supp. 99	7, 10
S. C. Schenck, The, 158 Fed. 54	10
Stearns Co. v. *United States*, 291 U.S. 54	11

Statutes:

Act of August 4, 1949, 63 Stat. 501, 14 U.S.C., Supp. V, 88	13
Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U.S.C. 781, 782	12
Tort Claims Act	12

Miscellaneous:

A.L.I. Restatement of Torts:	
Section 323, comment b	9
Section 324, comment d	10
Coast Guard Regulations, Art. 933	11
Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 Harv. L. Rev. 913 (1951)	10

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 490

THE P. DOUGHERTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS

The opinion of the District Court for the District of Delaware (R. 171-185) is reported at 97 F. Supp. 287. The opinions in the Court of Appeals for the Third Circuit (R. 191-235) are reported at 207 F. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1953 (R. 244). The petitioner's petition for rehearing was denied on

September 30, 1953 (R. 245). The petition for a write of certiorari was filed on December 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the special circumstances of this case, liability for damage to a rescued vessel, in the course of an uncompensated rescue operation by the Coast Guard, may be imposed on the United States where both courts below found that, despite the negligence of the Coast Guard cutter, the mishap would not have occurred but for the negligent failure of the rescued vessel to follow the Coast Guard cutter.

STATUTE INVOLVED

The pertinent provisions of the Coast Guard's authorization to rescue persons and to protect and save property are set forth in the Appendix, *infra*, p. 13.

STATEMENT

The libel in admiralty by the owner of the rescued barge HARFORD—to recover $50,000 under the Public Vessels Act for damages sustained when it grounded on a breakwater in the course of a gratuitous rescue operation in tow of the United States Coast Guard cutter MOHAWK—arises out of the following circumstances:

The HARFORD was a coastwise barge, 267 feet long by 46 feet wide, without motive power but equipped with steering gear, carrying a crew of three, a master and two ordinary seamen (R. 94, 172-173, 192).

On the morning of April 22, 1947, the HARFORD and the barge GORDON C. COOKE were being towed by the commercial tug BARLOW when her towing hawser parted and the HARFORD collided with the COOKE off the Delaware coast and was cast adrift in a leaking condition, in stormy weather and rough seas (R. 12, 95, 173). At the request of the BARLOW, the Coast Guard Station at Cape May, New Jersey, ordered the Coast Guard cutter MOHAWK to proceed to the HARFORD and stand by (R. 21-22, 95).[1]

The BARLOW left for Lewes, Delaware, to pick up a new hawser (R. 23, 24, 95). The MOHAWK reached the HARFORD early that night and stood by. On the morning of the 23rd, the Coast Guard base at Cape May instructed the MOHAWK to tow the HARFORD to the Harbor of Refuge. After some hours' delay due to the fact that the HARFORD had trouble raising her port anchor (her other anchor being unusable) and after petitioner's authority to cut the anchor was obtained, the MOHAWK got under way with the HARFORD in tow. (R. 90, 96.)[2] It then advised the Coast Guard base that the HARFORD was unable to anchor and requested a commercial tug to take over the tow five miles from Overfalls Lightship, off the entrance of Delaware Bay (R. 49-51, 55, 90, 193). The MOHAWK was told that the tug BARLOW was unable to take the barge in tow and

[1] The MOHAWK was not equipped for towing but was built as an icebreaker in 1934 (R. 51). It was stipulated that the service rendered by the MOHAWK was not to be compensated for as a salvage or towage service (R. 72).

[2] There was about six or seven feet of water in the barge at this time (R. 13, 17).

was directed to proceed to the Harbor of Refuge. The MOHAWK reached Overfalls Lightship in the evening of April 23rd.

The entrance to the Harbor of Refuge is between (1) Cape Henlopen on the south and (2) the tip of the Harbor of Refuge Breakwater on the north. The MOHAWK originally set a course midway between Cape Henlopen and the breakwater, but sighting a vessel at anchor inside the Harbor of Refuge, altered her course so that she would pass between the vessel and the breakwater (R. 174). In the belief that both of the HARFORD'S anchors were unusable and that it would therefore be necessary to circle around the anchored vessel until the BARLOW or some other tug could take the HARFORD in tow, the engine speed of the MOHAWK was reduced (R. 174-175). However, despite steering hard left, the MOHAWK was being carried off to the right. Meanwhile, as the MOHAWK came close to the entrance, the HARFORD began to steer hard right, accentuating the effect of the current and the wind upon the MOHAWK (R. 97). When the HARFORD struck the end of the breakwater, the MOHAWK cut the towing hawser. The HARFORD, cast adrift while still outside the Harbor of Refuge Breakwater, was forced against the breakwater for about an hour until she was removed by the tug JACK (R. 97-98).

After trial, the district court held that the MOHAWK had not exercised the reasonable care exacted of persons engaged in salvage operations and that improper steering of the HARFORD con-

tributed to the damage (R. 99). The court said (R. 179-180):

> * * * the analogy to a privately owned vessel rendering gratuitous assistance is not, in my opinion, entirely complete. The maintenance of such vessels as the MOHAWK is undertaken by the government pursuant to statutory authority and at public expense. * * * The MOHAWK was prepared and equipped, in part, at least, to render assistance to vessels in distress. Under these circumstances I am of the opinion that such a vessel must be held to answer for damage which results from her failure to exercise with reasonable care the skill and competence which her crew possess or may reasonably be expected to possess, which would, at the least, be ordinary skill and competence in the performance of such duties.

Inasmuch as "* * * even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185), the court, leaving the amount of the damages undetermined, awarded petitioner one-half of its damages (R. 185, 186).[3]

Both parties appealed from the interlocutory

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[3] The HARFORD had sustained two other separate and distinct casualties within the same period of two days, one before and one after the breakwater incident. The first was the collision with the COOKE which was severe enough for the HARFORD, a wooden barge, to cause the ultimate sinking of the COOKE. The second time she was again rescued by the MOHAWK after she had gone aground while in the tow of the tug JACK. (R. 61-62, 91, 175.) There is evidence that the damage at the breakwater, if any, was slight (R. 60, 90).

decree. The court of appeals, sitting *en banc*, and with four judges concurring in the prevailing opinion (Circuit Judges Kalodner, Maris, McLaughlin, and Hastie) reversed the decree and directed that petitioner's libel be dismissed. It said (R. 195):

> We do not agree that the negligence of the MOHAWK created liability as to her for three separate reasons: (1) the negligence of the MOHAWK was a "condition" and not a "cause" with respect to the happening of the accident; (2) the sole cause of the accident was the negligent failure of the HARFORD to follow the MOHAWK; and (3) the District Court erred in ruling as a matter of law that "Under the Public Vessels Act the United States is liable for damage due to the negligence of those in charge of the MOHAWK."

Although noting the United States was not a salvor, the court of appeals recorded its disagreement with the district court's ruling that even a salvor would be liable for simple negligence as distinct from gross negligence or misconduct (R. 206-207).

Three judges dissented. Two of the judges dissenting (Chief Judge Biggs and Circuit Judge Goodrich) believed that petitioner should recover all of its damages; the other (Circuit Judge Staley) was in favor of affirming the decree dividing the damages.

ARGUMENT

1. Only if this Court first reviews the evidence and then disagrees with both courts below in appraising it, will the Court reach petitioner's "prin-

cipal question" (Pet. 8)—the liability of the United States for negligence in rescue work—and the other questions discussed in the petition. The ruling chiefly challenged by petitioner was only a third alternative and "separate" ground of decision (R. 195, 201), introduced by the statement that "the District Court further erred in its disposition on still another score" (R. 201).

The court of appeals found that the negligence of the Coast Guard cutter MOHAWK was only a "condition" and not a "cause" of the accident and that the sole cause of the accident was the negligent failure of the HARFORD to follow the MOHAWK (R. 195, 200); the district court similarly concluded that "even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185). If this Court should undertake to review the evidence but should fail to overturn this evaluation of the evidence by the courts below, consideration of petitioner's "principal question" would not be necessary to decide the case. *Page* v. *United States*, 105 F. Supp. 99, 102 (E. D. La.). Merely to establish the principle that the United States is liable where simple negligence of the Coast Guard is the cause of damage to a rescued vessel would not benefit a petitioner who has failed to persuade the court below that any negligence on the part of the Coast Guard was the proximate cause of any loss or damage.[4] In fact, petitioner would have to overcome

[4] The Petition for Rehearing recognized that the court of appeals decided the case on the grounds that the MOHAWK's negligence was merely a condition of the HARFORD's damage

two independent grounds on which the Court of Appeals rested before the third ground became a necessary issue. Cf. *Calmar SS Corp.* v. *Scott*, 345 U. S. 427, 428.

Petitioner has not sought review of the factual questions, however, and has not addressed itself to demonstrating error in the conclusions of the court below, nor to establishing that the rescued vessel did not have it within its power to avert the loss or that the faulty steering of the HARFORD was not the cause of the loss.[5] In the circumstances,

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and that the HARFORD had failed to follow the MOHAWK (R. 237).

The dissent of Chief Judge Biggs, which is virtually adopted as the Argument of the Petition (Pet. 9), also recognized the sufficiency of the other grounds when it said: "It is unnecessary for the majority decision to go so far for having held that the *Mohawk's* towing, since it had become a 'condition,' did not cause the collision of the *Harford* with the Breakwater, that portion of the majority opinion dedicated to the Coast Guard exception is purest *dicta*" (R. 215-216).

[5] In any event, there would be no occasion for this Court to review the factual issues. The court of appeals, sitting *en banc*, gave thorough and painstaking consideration to the record, as the opinions indicate. The case was argued June 5, 1952, and then set down for reargument before the court *en banc* on December 1, 1952 (R. 190, 191). The decision was not rendered until September 9, 1953 (R. 191).

The difference in the court's appraisal of the negligence of the Coast Guard vessel and the barge is apparent from the distinction it makes in affirming the trial court's conclusion that both vessels were negligent. With respect to the finding as to the MOHAWK's negligence, the court of appeals merely said the evidence did not disclose it to be "clearly erroneous" although an opposite conclusion might have been reached (R. 202-203). In contrast, as to the HARFORD's negligence, it said that the evidence "demonstrates it to be fully warranted" (R. 203).

The icebreaker MOHAWK did not purport to possess the specialized knowledge that the current along the harbor entrance was so strong that instead of aiming for the mid-channel, the normal passage, she would have aimed for the southern side to allow for being swept up to the northward. As an uncom-

petitioner is seeking to have this Court render a supererogatory or advisory opinion on an abstract intellectual problem without concrete impact on the rights and liabilities of the parties before it. See *Coleman* v. *Miller*, 307 U. S. 433, 460-1 (concurring opinion).

2. The legal problem of the liability of the Coast Guard in its rescue operations is neither a frequently recurrent one of great practical importance, nor is it ripe for adjudication by this Court. As the district court observed, this "is the first known instance of an action based on the negligence of the Coast Guard" (R. 176).[6] Moreover, "[n]o authority or precedent has been cited or found regarding the duty of a privately owned vessel giving gratuitous assistance to another" (R. 179, 207). The recently brought Coast Guard rescue cases have fallen by the wayside on other grounds, such as inability to prove negligence or to show that libelants were put in a worse position as a result of Coast Guard action. *Lacey* v. *United*

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pensated emergency rescuer, it did not warrant or hold itself out as having knowledge of a local area where it did not want to go. In fact, it had asked for a commercial tug to take over (R. 55, 90). See A.L.I. *Restatement of Torts*, Section 323, comment b.

Steering the HARFORD at the orders of the captain, who went below to work the HARFORD's clogged pumps, was an 18 year old seaman (R. 12, 14, 18, 63-64, 96, 182, 193). The district court was "of the opinion that even the course adopted by the MOHAWK would have been a successful one had the HARFORD followed in a proper manner" (R. 185).

[6] It was significant, the court of appeals noted, that for the first twenty-five years of the Public Vessels Act, there was no attempt to recover damages arising out of the rescue operations of the Coast Guard (R. 205-6). The rarity of suits is, of course, attributable to some extent to the high standards maintained by the Coast Guard.

States, 98 F. Supp. 219 (D. Mass.); *Page* v. *United States,* 105 F. Supp. 99 (E. D. La.); see opinion below, R. 201-202, n. 12.

There is no impelling reason why the issue should "be settled finally and authoritatively at the very first opportunity", in a relative vacuum, as petitioner urges (Pet. 8). Even if one were to assume that the Coast Guard could be held liable under the Public Vessels Act for negligence in rescue operations, there are several alternative standards of care which can be suggested: (a) a *sui generis* standard; (b) a standard like that for performers of acts of charity; (c) one like that for commercial or non-commercial salvors (cf. *The S. C. Schenck,* 158 Fed. 54 (C. A. 6); *Derrington* v. *City of Detroit,* 223 Fed. 232, 240-241 (C. A. 6); *The Henry Steers, Jr.,* 110 Fed. 578 (E. D. N. Y.); (d) or one like that for firemen or gratuitous bailees (cf. A. L. I., *Restatement of Torts,* Section 324, Comment d; Seavey, *Reliance Upon Gratuitous Promises Or Other Conduct,* 64 Harv. L. Rev. 913, 927, fn. 57 (1951)). If the United States is to be held liable, as petitioner contends (but we deny), the experience of further litigation will help in determining (1) the applicable standard of care for different kinds of rescues,[7] as well as (2) the degree of diligence with

[7] For instance, experience might add meaning to the emphasis in the petition that the HARFORD was picked up "at sea on the request of a privately owned tug (not connected with petitioner) following the parting of that tug's hawser" (Pet. 2). The tug was the BARLOW and the tow to which the cable was attached was petitioner's barge, the HARFORD (R. 10, 95, 173). "The MOHAWK passed her hawser to the HARFORD and the towage began at about noon on April 23, 1947" (R. 96). The dissociation from the request for help and the rescue operation itself is strained and comes after the event.

which the rescued vessel should set about to make arrangements for available commercial towing and salvage facilities.[8] There is especially good reason

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Experience might also disclose a disposition on the part of the rescued to undervalue the service and the danger and exaggerate the shortcomings of the rescuer, and provide a framework in which to consider the petitioner's suggestions that the United States should make amends for the availability of the Coast Guard for rescue work and that it has merely "invade [d] the field of so-called 'rescue' " and replaced available commercial salvors (R. 242-3).

[8] By Article 933 of the Coast Guard Regulations, the Coast Guard is prohibited from competing with private tugs and is directed to turn over a rescued vessel to commercial interests as soon as possible. Article 933 provides that the Commanding Officer, in extending assistance to vessels "shall not interfere with private enterprise, though he may assist private effort, and it shall be his duty to do so when he deems it necessary. He shall not use his vessel for towing private craft, except in cases of distress, and not even then if there be other and sufficient assistance at hand."

In view of the Coast Guard's intention to stand by the HARFORD and the men aboard only until the BARLOW could get a new hawser, its request that a tug come out and take over at Overfalls Lightship (R. 49-51, 55, 90, 193), and the owner's delay in employing one of the available commercial tugs to take over outside the Harbor of Refuge when the BARLOW failed to come out, it seems curious for petitioner to urge that "[a]s a result of the Coast Guard's performance of operations similar to the one here involved, private towing companies and salvage companies no longer maintain vessels at various ports available to assist craft which have suffered temporary disablement, but are not exposed to dangerous weather conditions" (R. 242). The MOHAWK was not officiously obtruding its towing services, but was forced into the situation by petitioner's inaction. Regardless of whether, as petitioner maintains, "the Barlow, without libelant's consent, requested the services of the Coast Guard" (R. 243), petitioner never rejected the benefit of the services solicited for it by the BARLOW, even after the HARFORD was allegedly out of the zone of danger, but suffered them to continue instead of making immediate arrangements (as was its duty) for the professional assistance that was in fact available. It is in effect trying to found a claim upon its own unexplained failure to relieve the MOHAWK in accordance with the Coast Guard regulations. Cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62. If other tugs rested on their oars and

to await further clarification of the legal principles controlling non-Governmental rescue operations (see the clash of opinion on this point in the court below (R. 206-7, 217 ff.)), for if the United States is held liable the assimilated standard under the Public Vessels Act would be "the principles of law * * * obtaining in like cases between private parties". *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228. See also, "in the same manner and to the same extent as a private individual in like circumstances," the corresponding standard of the Tort Claims Act. *Dalehite* v. *United States*, 346 U. S. 15, 44.

CONCLUSION

The issue presented as to the standard of care required of the Coast Guard in its rescue operations could be reached only in the event that this Court should first review the evidence and overturn the finding of the courts below. It is accordingly submitted that the case is not in a posture appropriate for the consideration of this Court and the petition for a writ of certiorari should be denied.

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JANUARY 1954.

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failed to come out, their inaction was in no way attributable to the Coast Guard, much less to the MOHAWK. Cf. *Lacey* v. *United States*, 98 F. Supp. 219, 220 (D. Mass.).

APPENDIX

Section 1 of the Act of August 4, 1949, 63 Stat. 501, 14 U. S. C., Supp. V, 88, provides in pertinent part (as it appears in 14 U. S. Code, Supp. V):

§ 88. Saving life and property.

(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

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